Supreme Court, U.S.
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No. 06- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
JUAN P. MORILLO
STEVEN T. COTTREAU
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

December 19, 2006

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether plaintiffs' alleged wage-suppression damages are a direct injury under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), and whether the Eleventh Circuit's holding can be reconciled with *Anza* v. *Ideal Steel Supply Co.*, 126 S. Ct. 1991 (2006).

2. Whether a corporation and its agents can constitute an association-in-fact RICO enterprise and whether a company's hiring of its own employees may constitute participation in the conduct of an enterprise that is distinct from the company itself?

3. Whether employees who received the wages for which they contracted have suffered an injury to "business or property" within the meaning of 18 U.S.C. § 1964(c)?

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption above.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Mohawk Industries, Inc. states that there is no parent corporation or publicly held corporation that owns 10% or more of Mohawk Industries, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohawk Industries, Inc. ("Mohawk") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the district court denying in part and granting in part petitioner's motion to dismiss was reported at 314 F. Supp. 2d 1333 (N.D. Ga. 2004) and is reproduced in the appendix (Pet. App.) at 32a-69a. The order of the district court certifying the case for interlocutory appeal was unpublished and is reproduced at Pet. App. 70a-74a. The order of the Eleventh Circuit granting Mohawk's petition for interlocutory appeal was unpublished and is reproduced at Pet. App. 75a. The June 9, 2005 opinion of the court of appeals affirming in part and reversing in part the district court's order was published at 411 F.3d 1252 (11th Cir. 2005) ("*Williams I*"). The order of the court of appeals denying rehearing en banc for *Williams I* was unpublished and is reproduced at Pet. App. 76a. This Court's December 12, 2005 order granting certiorari limited to the first question in Mohawk's petition was published at 126 S. Ct. 830 (2005) and is reproduced at Pet. App. 30a. This Court's June 5, 2005 order dismissing its partial grant of certiorari as improvidently granted, granting certiorari without limitation, vacating *Williams I*, and remanding to the Eleventh Circuit for reconsideration in light of *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), was published at 126 S. Ct. 2016 (2006) and is reproduced at Pet. App. 31a. The September 27, 2006 opinion of the court of appeals after remand was published at 465 F.3d 1277 (11th Cir. 2006) ("*Williams II*") and is reproduced at Pet. App. 1a-29a. The order of the court

of appeals denying rehearing en banc for *Williams II* was unpublished and is reproduced at Pet. App. 77a.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2006. An order denying rehearing was entered on November 22, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are listed in the appendix. See Pet. App at 78a-79a.

STATEMENT OF THE CASE

This case presents three important questions about the scope and construction of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), which have divided the courts of appeals and which have significant consequences for civil RICO litigation. Plaintiffs filed this RICO suit on behalf of a putative class of current and former hourly employees of Mohawk. Plaintiffs allege that Mohawk hired illegal immigrants and thereby suppressed the wages that plaintiffs were offered and voluntarily accepted. The Eleventh Circuit's ratification of this theory of liability (i) is at odds with this Court's direct injury holding in *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), (ii) exacerbates a deep split among the courts of appeals over RICO's association-in-fact enterprise requirements, and (iii) adds to widening circuit conflicts over the meaning of civil RICO's injury to "business or property" standing requirement.

Last Term, this Court initially granted certiorari in this case to resolve the second of these three questions: namely, whether a defendant corporation can conduct or participate in

the conduct or the affairs of a distinct association-in-fact enterprise where the only members of the putative "association-in-fact enterprise" are the corporation and its agents. That question was argued before this Court on April 26, 2006. In light of this Court's *Anza* decision, this Court chose not to resolve the enterprise issue, instead granting certiorari in this case on the direct injury question presented, vacating the Eleventh Circuit's opinion, and remanding this case for reconsideration in light of *Anza*.

On remand, however, the Eleventh Circuit ignored the central holding of *Anza*—that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts and not by another "set of actions ... entirely distinct from the alleged RICO violation." *Id.* at 1997. Instead, the Eleventh Circuit fundamentally misread *Anza* to hold that it is enough for civil RICO standing where there is some "correlation" between the predicate act (illegal hiring) and the asserted injury (depressed wage levels). See Pet. App. at 18a. This cramped misinterpretation limits *Anza* to its facts and deprives the case of its import: confining RICO civil litigation to instances where the alleged injury actually stems from the RICO violation itself—and not from other tangential acts. Other courts of appeals have faithfully executed the clear holding in *Anza*, which makes the Eleventh Circuit's approach particularly worthy of this Court's review.

This case also presents a second critical and still unresolved question on which this Court granted certiorari in this case last Term: whether a corporation can constitute an association-in-fact RICO enterprise and whether such an enterprise is distinct from the defendant corporation itself. As the Eleventh Circuit candidly acknowledged, its decision below "puts our circuit in conflict" with the Seventh Circuit's construction of the enterprise requirement in a materially indistinguishable case. Pet. App. at 10a. Indeed, the split in the courts of appeals on this question has widened to a 3-3 split, as the Ninth Circuit has joined the Sixth and Eleventh

Circuits in concluding that such enterprises are distinct and thus permissible, while the Second, Third, and Seventh Circuits have held they are not. This split warrants this Court's attention at least as much as it did last Term.

The third question meriting this Court's review is whether plaintiffs have alleged an injury to their "business or property," as required for civil RICO standing by 18 U.S.C. § 1964(c). The courts of appeals are deeply divided on the extent to which state law defines the interests that convey standing under civil RICO. Below, the Eleventh Circuit held that plaintiffs had a sufficient interest because they have "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." Pet. App. at 13a (internal quotation marks omitted). That "entitlement," however, is neither a property right nor a business under civil RICO.

In reaching these flawed conclusions, the Eleventh Circuit's decision permits plaintiffs to proceed with RICO suits based upon ordinary business conduct. As Justice Breyer noted during oral argument in this case last Term, Congress never intended to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). But that is precisely what the Eleventh Circuit (and other courts of appeals) has permitted: a suit, alleging a contrived enterprise based upon ordinary business contracts, brought by plaintiffs with no cognizable injury, and certainly, no injury directly caused by the conduct prohibited by RICO. The Court should grant certiorari to help restore civil RICO to its proper role: that of a narrowly drawn remedy aimed at providing redress to the direct victims of crimes—not a blunderbuss weapon employing *in terrorem* remedies to extort windfall recoveries.

1. On January 6, 2004, the respondents filed a complaint in the United States District Court for the Northern District of Georgia on behalf of a putative class of current and former

hourly employees of petitioner Mohawk. Pet. App. at 85a-109a. Mohawk was the only named defendant. Mohawk (and its subsidiaries) is a leading manufacturer of carpet, rugs, tile, and other floor coverings. Plaintiffs asserted a federal RICO claim under 18 U.S.C. § 1962(c), two claims under Georgia's RICO statute (Ga. Code Ann. § 16-14-4), and a claim for unjust enrichment. All of these claims stemmed from plaintiffs' allegation that Mohawk had knowingly employed illegal aliens and that this employment of illegal workers somehow depressed wages for all of Mohawk's legal hourly workers throughout the State of Georgia.[1] See Pet. App. at 88a-92a (Compl. ¶¶ 14-35).

The Complaint almost exclusively alleged misdeeds by Mohawk or its employees unrelated to any RICO enterprise. For example, plaintiffs alleged that "Mohawk has accepted for employment ... workers that it knew or had reason to know were not authorized to work in the United States"; that "Mohawk has knowingly and recklessly accepted" obviously false documentation for employees; that "Mohawk supervisors have encouraged ... employees to ... [illegally] reapply for work at Mohawk"; that "Mohawk employees and/or supervisors have destroyed eligibility documents" to conceal Mohawk's employment of illegal workers; that "Mohawk employees have traveled to the United States border ... to recruit undocumented aliens"; and that "Mohawk employees and supervisors have assisted illegal workers in attempting to evade detection by law enforcement." Pet. App. at 88a-89a, 91a (Compl. ¶¶ 15-18, 20, 22, 28).[2]

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[1] While the allegations in the Complaint must be taken as true at this stage, Fed. R. Civ. Proc. 12(b)(6), Mohawk vigorously denies any illegal conduct.

[2] The Complaint set forth five alleged RICO predicate acts: (1) knowingly hiring more than 10 illegal aliens during a 12-month period, in violation of 8 U.S.C. § 1324(a)(3)(A); (2) harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii); (3) encouraging illegal aliens to enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv);

In an attempt to satisfy § 1962(c)'s requirement that the defendant conduct the affairs of a distinct "enterprise" (and not just its own affairs), plaintiffs alleged that Mohawk had participated in "an association-in-fact enterprise with third party employment agencies and other recruiters." Pet. App. at 101a (Compl. ¶ 76). In particular, plaintiffs alleged that these third-party recruiters supplied illegal workers to Mohawk and that Mohawk paid the recruiters a fee for each worker they supplied. See *id.* Plaintiffs asserted without explanation that Mohawk participated in the operation and management of the affairs of this "enterprise." *Id.* (Compl. ¶¶ 77, 78). Plaintiffs further asserted that the enterprise "exists for Mohawk's benefit." *Id.* (Compl. ¶ 78). Plaintiffs did not name any participants in this supposed "enterprise" other than Mohawk and its employment recruiters.

Plaintiffs asserted that they "have suffered an injury to their 'business or property,' *i.e.* lost wages, as a direct result of Mohawk's violation of federal RICO." Pet. App. at 103a (Compl. ¶ 86); see 18 U.S.C. § 1964(c) (civil RICO plaintiffs must be "injured in [their] business or property by reason of a violation of section 1962"). According to plaintiffs, the wages that Mohawk pays (and that plaintiffs accepted) are "depressed" by Mohawk's alleged misconduct. See Pet. App. at 91a-92a (Compl. ¶ 33) ("Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby to pay all of its hourly employees ... wages that are lower than they would be if Mohawk did not engage in this illegal conduct."). This depression supposedly occurs because Mohawk's employment of undocumented workers effects an "unlawful expansion of the labor pool" in north Georgia that "permit[s]

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(4) accepting false identification documents, in violation of 18 U.S.C. § 1546(a); and (5) using false identification documents, in violation of 18 U.S.C. § 1546(b). *See* Pet. App. at 97a-99a. *See also* 18 U.S.C. § 1961(1)(B), (F) (providing that violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 constitute "racketeering activity" for RICO purposes).

Mohawk to depress the wages that it pays all its hourly employees." *Id.* at 92a (Compl. ¶ 35). The Complaint offered no explanation for how Mohawk could pay below-market wages and retain its workforce, nor did it claim that Mohawk had sufficient market power to depress wages throughout Georgia. Instead, plaintiffs merely alleged generally that Mohawk's employment of "hundreds" of illegal aliens somehow depressed the wages of the millions of workers in Georgia. *Id.* at 98a (Compl. ¶ 61).

2. Mohawk moved to dismiss all four counts of the complaint, arguing *inter alia* that respondents had failed to plead a legally sufficient RICO enterprise and that they had not pled a direct injury to business or property proximately caused by the alleged predicate acts.[3] The district court denied Mohawk's motion to dismiss the federal and Georgia RICO claims.[4] Pet. App. at 69a. The district court, however, granted Mohawk's motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed discovery pending resolution of the appeal. Pet. App. at 74a. The court found that there was "substantial ground for difference of opinion" both as to whether plaintiffs had pled an adequate RICO enterprise and as to whether they had pled sufficient proximately caused direct injury to business or property, and concluded that these issues merited immediate review. *Id.* at 72a-73a.

3. The Eleventh Circuit accepted the certification, Pet. App. at 75a, and affirmed the district court's denial of

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[3] Georgia courts have followed federal RICO caselaw when interpreting the scope of proximate cause for the Georgia RICO statute. *See Maddox v. Southern Eng'g Co.*, 500 S.E.2d 591, 594 (Ga. Ct. App. 1998).

[4] The district court partially granted Mohawk's motion to dismiss the unjust enrichment claim, dismissing plaintiffs' claim for unjust enrichment based on Mohawk's supposed benefit from workers' compensation savings. Pet. App. at 69a.

Mohawk's motion to dismiss the federal and Georgia RICO claims.[5] *Williams I*, 411 F.3d at 1266.

4. Mohawk filed a petition for certiorari on October 7, 2005, requesting review on two questions: (1) whether Mohawk, together with its agents, can constitute an enterprise under RICO, and (2) whether plaintiffs pled direct injuries to business or property. Mohawk Cert. Pet. at *i, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 830, 2005 WL 2566486 (Oct. 7, 2005). This Court granted certiorari limited to the first question on December 12, 2005. See Pet. App. at 30a. That question was briefed on the merits and was argued on April 26, 2006.

On June 5, 2006, this Court issued its opinion in *Anza*. That same day, the Court issued an order dismissing its partial grant of certiorari as improvidently granted, granting certiorari without limitation, vacating *Williams I*, and remanding to the Eleventh Circuit for reconsideration in light of *Anza*. See Pet. App. at 31a. Petitioner's reply brief had proposed precisely this course of action if the Court were to decide the causation issue in *Anza* in the way that it did. Pet. Reply at *13 n.10, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 830, 2006 WL 951123 (Apr. 11, 2006).

5. On remand, the Eleventh Circuit ordered supplemental briefing on the RICO claim limited to the impact of *Anza* and reaffirmed (*Williams II*).[6] Rather than faithfully apply *Anza*'s

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[5] The Eleventh Circuit reversed the district court's judgment on the unjust enrichment claims in part, holding that plaintiffs' unjust enrichment claim should have been dismissed in its entirety because plaintiffs contracted for the wages they received. *Williams I*, 411 F.3d at 1266.

[6] The briefing limitation was prompted by plaintiffs' request that the Eleventh Circuit preclude supplemental briefing on "the enterprise issues that Mohawk unsuccessfully argued to the Supreme Court." Appellees' Resp. to Mohawk Indus., Inc.'s Mot. for Leave to File Supplemental Briefing at 4, *Williams* v. *Mohawk Indus., Inc.*, No. 04-13740-AA (11th Cir. filed Jul. 7, 2006). Mohawk opposed the limitation, noting that the

direct injury guidance and determine whether the claimed injury was caused by actions "entirely distinct" from the claimed RICO violation, the court of appeals recited verbatim the paragraphs from *Williams I* in reiterating its holding that "the plaintiffs have alleged sufficient proximate cause." Compare Pet. App. at 16a, with *Williams I*, 411 F.3d at 1261-62. The Eleventh Circuit purported to distinguish *Anza*, asserting that there was a "correlation between illegal hiring and lower wages," Pet. App. at 18a, and suggesting that plaintiffs' allegations about the "purpose and intended effect" of Mohawk's supposed illegal hiring were sufficient, *id.* at 16a. The Eleventh Circuit also claimed that "the concerns expressed in *Anza*" only apply where another directly injured party could bring a RICO civil suit. *Id.* at 18a-19a.

The Eleventh Circuit also upheld the legal sufficiency of the enterprise allegations. The Eleventh Circuit held that a plaintiff could survive a motion to dismiss by alleging an "enterprise" consisting of any "loose or informal association of distinct entities." Pet. App. at 8a (internal quotation marks omitted). The court further held that the plaintiffs' general allegation that "Mohawk participates in the operation and management of the affairs of the enterprise" was sufficient participation in the conduct of a distinct enterprise. *Id.* at 9a-10a (internal quotation marks omitted).

The Eleventh Circuit candidly acknowledged that its enterprise "conclusion puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*" Pet. App. at 10a. In *Baker*, the Seventh Circuit confronted materially identical allegations.[7] That court, however, held that the

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court may wish to reconsider *en banc* circuit precedent holding that a corporation may be a member of an association-in-fact enterprise.

[7] In *Baker*, the plaintiffs alleged that the defendant corporation was violating immigration laws by employing illegal aliens—and, like plaintiffs here—claimed that the RICO enterprise consisted of the defendant corporation and third parties that assisted in recruiting employees.

enterprise allegations were legally flawed: allegations that a corporate defendant was unlawfully hiring its workers did not constitute the requisite participation in a separate enterprise—they only amounted to a claim that the corporation was "operat[ing] *itself* unlawfully." *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (Easterbrook, J.). The Eleventh Circuit rejected this analysis, claiming that it was "possible" for plaintiffs to establish that Mohawk operated or managed the supposed "enterprise" of Mohawk and its recruiters. Pet. App. at 12a. The Eleventh Circuit did not explain how this could be "possible" or how Mohawk's hiring of its own employees constituted the operation or management of the affairs of a distinct enterprise—as opposed to Mohawk's own affairs.

Finally, the Eleventh Circuit concluded that plaintiffs' bid for a retroactive wage increase was a cognizable interest under RICO. Pet. App. at 12a-13a. According to the Eleventh Circuit, plaintiffs have a "'legal entitlement to business relations unhampered by the RICO predicate statutes,'" which confers civil standing under § 1964(c). *Id.* at 13a (quoting *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)).

6. On October 18, 2006, Mohawk filed a petition for rehearing en banc, specifically asking the Court to review the panel's interpretation of *Anza* and to reconsider preexisting Eleventh Circuit precedent holding that corporations may be constituent members of an association-in-fact enterprise. The Eleventh Circuit denied the petition on November 22, 2006. Pet. App. at 77a.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT IGNORED THIS COURT'S HOLDING IN *ANZA*.

Last Term, this Court vacated the Eleventh Circuit's prior decision in this case and remanded with instructions to

reconsider in light of this Court's *Anza* decision. The Eleventh Circuit failed to follow the Court's direction to apply *Anza*'s holding to this case, and instead reaffirmed its prior ruling on bases that *Anza* squarely rejects and caused an immediate split with the Seventh Circuit over the interpretation of the direct injury requirement after *Anza*.

In *Anza*, plaintiff Ideal Steel Supply Corp. ("Ideal") brought a RICO action against its competitor National Steel Supply, Inc. ("National") and National's owner-operators Joseph and Vincent Anza. Plaintiff alleged that National unlawfully failed to charge state sales tax to customers that paid in cash. *Anza*, 126 S. Ct. at 1994. Plaintiff alleged that this amounted to state tax fraud and permitted National effectively to cut its prices. See *id.* at 1995. Ideal pled that its lost sales were "direct[ly]" caused by this racketeering scheme. Am. Compl. ¶ 1, *Ideal Steel Supply Corp.* v. *Anza*, 02 Civ. 4788 (RMB) (S.D.N.Y. Sept. 13, 2002), *available at* 2006 WL 122082, at *5-20 (hereafter "*Anza* Complaint") ("[T]he intent and direct effect of [the RICO violation] is to cause Ideal, National's principal competitor, to lose a substantial part of its business to National.").[8] Significantly, Ideal's injury was not a derivative or passed-on injury; it alleged an injury that was entirely its own. See *Anza*, 126 S. Ct. at 1997 ("Ideal asserts it suffered *its own* harms when the Anzas failed to charge customers for the applicable sales tax" (emphasis added)).

This Court held that Ideal failed to plead a proximately-caused direct injury cognizable under RICO. See *id.* at 1997-

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[8] Ideal's complaint extensively detailed each step of the causal chain between National's tax fraud and Ideal's claimed losses. Ideal pled that it and National were sole competitors and that they "compete primarily on the basis of price." *Anza* Compl. ¶¶ 19-22. National's tax fraud enabled it to cut the effective price of its products by 8.25%, and this illegal discount gave National a "competitively significant price advantage over Ideal." *Id.* ¶¶ 32-34. This price advantage caused a "steep drop in taxable cash sales" at Ideal's facilities, which "can only be explained by National's unlawful price advantage." *Id.* ¶¶ 35-36.

98. Critically, this Court did not hold that plaintiff's theory of causation was illogical—it was perfectly logical that the reduction of effective prices by 8.25% (the amount of New York's sales tax) could cause customers to switch steel suppliers. Instead, *Anza* held that RICO's direct injury requirement demands more than logic. The "central question" in evaluating whether a RICO plaintiff has pled a direct injury is "whether the alleged RICO violation led directly to the plaintiff's injuries." *Id.* at 1998. Under this analysis, Ideal's alleged injury was indirect, because "[t]he cause of Ideal's asserted harms ... is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." See *id.* at 1997. In short, RICO requires that the alleged injury be immediately caused by the RICO violation and not be dependent upon some other intervening choice or action.

This Court explained that its indirect-injury conclusion was confirmed by two "discontinuit[ies]" between the cause of Ideal's asserted harms and the alleged predicate acts. *Id.* First, National "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud." *Id.* ("[T]he fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere."). Second, Ideal's alleged injury "could have resulted from factors other than" National's decreased prices. *Id.* This Court reasoned that "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Id.* It concluded that the direct injury requirement "is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Id.* at 1998.

The instant case has identical defects which are patently apparent. Indeed, last Term this Court vacated and remanded this case for reconsideration in light of *Anza*. Plaintiffs in this case allege that Mohawk paid them a depressed wage because

Mohawk allegedly hired other undocumented workers. But under *Anza*, Mohawk's conduct with respect to *other* parties does not cause a *direct* injury to the plaintiffs. As in *Anza*, "[t]he cause of [plaintiffs'] asserted harms ... is a set of actions [(payment of lower wages)] entirely distinct from the alleged RICO violation [(hiring unauthorized workers)]." *Id.* at 1997.

Likewise, this fundamental flaw is confirmed by the same two principal factors set forth in the *Anza* decision. First, just as the defendant in *Anza* "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud," Mohawk could have set plaintiffs' wages based upon a host of economic, business, and competitive reasons unrelated to its alleged hiring of unlawful workers. *Id.* Second, as in *Anza*, simply because a company "commits [immigration violations] does not mean the company will lower its [wages]." *Id.* As a result, the Eleventh Circuit's decision permits precisely the types of "speculative" and "intricate" causation inquiries that this Court has sought to exclude from RICO litigation.

In reaching its decision, the Eleventh Circuit misread this Court's *Anza* opinion in two critical respects. First, the court held that the direct injury requirement is met because of a "correlation between illegal hiring and lower wages."[9] Pet. App. at 18a. But a mere correlation is not enough to sustain a RICO claim. If it were, then Ideal's injury in *Anza* would have been direct, for there certainly could be a correlation

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[9] The Eleventh Circuit found support for this correlation in *DeCanas* v. *Bica*, 424 U.S. 351 (1976). Pet. App. at 17a-18a. But *DeCanas* had nothing to do with RICO or its direct injury requirement—instead it dealt only with state police power to regulate the employment of illegal aliens. 424 U.S. at 356-57. The notion that there is a relationship between illegal hiring and lower wages that is sufficient to justify a State's enactment of laws of general applicability does not remotely support the notion that there is a sufficiently *direct* injury to one set of employees resulting from a single employer's hiring decisions with respect to employees.

between lost sales and its sole competitor's effective price cuts. Instead, *Anza* requires an assessment of whether the RICO violation is the action immediately causing the alleged injury. Despite the *Anza* decision's efforts to emphasize this point, the Eleventh Circuit ignored this critical holding of *Anza*.

Moreover, the court of appeals' claim that "*Anza*'s concern about speculative damages, 'intricate, uncertain injuries,' and unwieldy apportionment are not implicated in this case" is baffling. *Id.* at 19a. Here, plaintiffs must show that they would have received some hypothetical higher wage rate if Mohawk had not engaged in the alleged unlawful hiring. But numerous "factors other than [Mohawk's] alleged acts of fraud" affect the wages that an employer pays—including the overall health of the national and local economies, the profitability of the carpet industry, competition for labor from other Georgia employers, and the individual skills and productivity of each worker. *Anza*, 126 S. Ct. at 1997. These inherent complications in plaintiffs' claim for depressed wages confirm the indirect nature of the injury alleged.

The Eleventh Circuit also rested its holding of a direct injury upon a basis that *Anza* held to be impermissible. The Eleventh Circuit repeatedly noted that a direct injury existed because plaintiffs specifically pled that Mohawk's "hiring and harboring of illegal workers has the purpose and direct result of depressing the wages paid to the plaintiffs." Pet. App. at 17a, 23a-24a. This reliance on the averments of a "purpose" to injure plaintiffs and on conclusory allegations of "directness" flatly contradicts *Anza*. In fact, the *Anza* plaintiff made identical allegations—that "[t]he purpose and direct effect" of the defendants' tax fraud was to cause the alleged RICO injury. See *Anza* Compl. ¶ 32. This Court rejected the adequacy of such allegations, concluding that a "RICO plaintiff cannot circumvent the proximate-cause requirement

simply by claiming that the defendant's aim was to [cause the alleged injury]." *Anza*, 126 S. Ct. at 1998.[10]

The Eleventh Circuit's interpretation of *Anza* has already created a new circuit split. In contrast to the Eleventh Circuit, the Seventh Circuit has applied *Anza* to bar complaints alleging injuries that were not directly caused by the RICO violation. In *James Cape & Sons Co.* v. *PCC Construction Co.*, the plaintiff ("Cape") alleged that the defendant construction companies conspired to learn the amount of Cape's bids for state contracts, used this knowledge "to unfairly manipulate the bidding process by underbidding Cape by small increments," and thereby caused Cape to lose bids and business. 453 F.3d 396, 398 (7th Cir. 2006). The Seventh Circuit held that there was no direct injury because "[a] court could never be certain whether Cape would have won any of the contracts that were the subject of the conspiracy 'for any number of reasons unconnected to the asserted pattern of fraud.'" *Id.* at 403 (quoting *Anza*, 126 S. Ct. at 1997). The Eleventh Circuit's holding in the instant case, however, would have permitted Cape's suit to proceed, for there certainly could be a "correlation" between the defendants' bid manipulation violations and Cape's alleged damages.

In short, the Eleventh Circuit has adopted a cramped interpretation of *Anza* that robs the direct injury requirement of its important gatekeeping function: confining RICO litigation to cases where the victim seeks redress for an injury directly caused by the racketeering activity. The Eleventh Circuit's decision continues to permit creative plaintiffs to

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[10] In addition, the Eleventh Circuit misread *Anza* to hold that dismissal is inappropriate where "[t]here is no more direct injured party who could bring suit." Pet. App. at 19a. This reflects a fundamental misunderstanding of *Anza*. The issue is not whether there is another (or "more direct") victim. Instead, the issue is whether the RICO violation immediately causes the injury or whether instead the direct cause of injury is distinct from the alleged violation. *Anza*, 126 S. Ct. at 1997.

plead RICO claims that are far-fetched and far afield from RICO's core purposes.

The Eleventh Circuit's failure to heed *Anza* in the wake of this Court's explicit instruction to do so warrants certiorari. This Court has often granted certiorari after a lower court fails correctly to interpret a decision that it was instructed to consider in an order granting certiorari, vacating the previous opinion, and remanding for reconsideration. See, *e.g.*, *DeBuono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 812 (1997); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A DEFENDANT CORPORATION AND ITS AGENTS ACTING ON ITS BEHALF CAN CONSTITUTE A DISTINCT ASSOCIATION-IN-FACT ENTERPRISE.

The second critical issue presented by this case is an issue that this Court has already recognized as warranting its attention: whether a corporate defendant can conduct or participate in the conduct of the affairs of a RICO "enterprise" comprised solely of the corporation and its non-employee agents performing tasks for the corporation. Last Term, this Court initially granted certiorari in this case to resolve the deep divide amongst the courts of appeals on this issue. That divide has since widened. The Eleventh Circuit's holding that the enterprise allegations here are sufficient parallels similar holdings in the Sixth and Ninth Circuits. The Second, Third, and Seventh Circuits disagree, holding that such "associations-in-fact" are indistinct from the corporations themselves. Indeed, the Eleventh Circuit itself acknowledged that its decision that a manufacturer and its employment recruiters could comprise an association-in-fact enterprise "puts our circuit in conflict" with the Seventh Circuit's construction of the enterprise requirement in a materially identical case. Pet. App. at 10a. This Court should again grant certiorari to resolve this question.

Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The statute contemplates "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001). Plaintiffs proceeding under § 1962(c), therefore, must plead and prove an enterprise that is distinct from the defendant. Thus, a RICO plaintiff cannot sue a corporation and name that same corporation as the RICO enterprise. Relatedly, plaintiffs must show that a defendant "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

In the wake of *Cedric Kushner* and *Reves*, plaintiffs have creatively pled around these requirements by suing a corporation and naming as a "distinct" enterprise an association in fact consisting of the corporation and other agents with which it contracts.[11] Grappling with this issue, the courts of appeals generally have recognized that a defendant corporation's association with its own employees does not form an enterprise distinct from the corporation

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[11] The *Cedric Kushner* Court took note of this type of an enterprise, stating that a purported "enterprise" comprised of a corporation and its employees and agents would be an "oddly constructed entity" and noting it would present "quite different circumstances" than the enterprise in *Cedric Kushner*. 533 U.S. at 164. *Cedric Kushner* itself involved an individual who was president and sole shareholder of a closely held corporation and who was accused of conducting the affairs of that corporation (the alleged RICO "enterprise") through a pattern of racketeering. *See id.* at 160. This Court held that the defendant, as an individual, was distinct from the corporation he controlled. *See id.* at 163. Indeed, *Cedric Kushner* presented a classic RICO fact pattern—an individual defendant using an organization (the RICO enterprise) for criminal purposes.

itself.[12] The circuits, however, have divided over whether a corporation and non-employee agents performing tasks for the corporation form a distinct RICO enterprise.

The Eleventh Circuit in the decision below and the Sixth and Ninth Circuits have concluded that an enterprise can be pled adequately so long as the corporation and the agents in the alleged "enterprise" are "distinct entities," even if those agents are merely performing services for the corporation. The "distinct entities" test used by the Eleventh Circuit in the instant case, see Pet. App. at 8a, 9a, mirrors the Sixth Circuit's test in *Davis* v. *Mutual Life Insurance Co.*, 6 F.3d 367, 377 (6th Cir. 1993).

The Ninth Circuit recently joined the Sixth and Eleventh Circuits in holding that an enterprise can consist of a corporation and non-employee agents working on its behalf. *Living Designs, Inc.* v. *E.I. DuPont De Nemours & Co*, 431 F.3d 353 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2861 (2006).

By contrast, the Second, Third, and Seventh Circuits have held that because a corporation necessarily acts through agents, an "enterprise" consisting of a defendant corporation and agents acting on its behalf do not constitute an enterprise distinct from the corporation itself. See *Baker*, 357 F.3d at 691-92; *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (Posner, C.J.); *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996); *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991). These courts have reasoned that because a corporation can act only through agents, an "enterprise" of a defendant and entities acting on its behalf "is in reality no more than the defendant itself." *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); see *Fitzgerald*, 116 F.3d at 228; *Discon*, 93 F.3d at 1064; *Brittingham*, 943 F.2d at 303.

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[12] *See, e.g., Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Old Time Enters., Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989).

In *Fitzgerald* the Seventh Circuit found that the defendant Chrysler's association with its "affiliates and agents" was not a separate enterprise. 116 F.3d at 226 (Posner, C.J.). The *Fitzgerald* plaintiffs alleged that Chrysler had engaged in a scheme fraudulently to deny warranty protection to consumers, and that it carried out this scheme through an "association-in-fact" enterprise with Chrysler dealerships. See *id.* The Seventh Circuit held that this supposed enterprise was not distinct from Chrysler itself. See *id.* at 228. The court recognized the illogic in applying RICO liability to a corporation using outside agents when no liability would attach for the corporation's use of its own employees in the same way: "we cannot imagine ... applying RICO to a free-standing corporation such as Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does." *Id.* at 227.

The Second Circuit has reached similar conclusions. In *Riverwoods*, the Second Circuit held that "a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of a defendant" is not distinct from the corporate defendant. 30 F.3d at 344. The Second Circuit later followed the same rule in *Discon* to hold that a corporation and third parties working on its behalf could not form an enterprise. In *Discon*, the plaintiffs alleged that the enterprise consisted of several entities within a single corporate structure and their "attorneys, accountants and other agents." 93 F.3d at 1064 (internal quotation marks omitted). The Second Circuit concluded that this enterprise was indistinguishable from the corporation itself; neither a corporation's "agents" nor its "employees" were distinct from the corporation "so long as those persons act on behalf of the corporation." *Id.*[13]

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[13] This Court's decision in *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998), reversed the Second Circuit's decision only as to the plaintiffs' Sherman Act claims; this Court did not review the Second Circuit's decision on the RICO claims. *Id.* at 133.

The Third Circuit has followed suit, holding that an "enterprise" consisting of a defendant corporation and advertising agencies acting on its behalf is not distinct from the corporation itself. See *Brittingham*, 943 F.2d at 302. In *Brittingham* the court explained that a corporate defendant is differently situated from an individual defendant accused of manipulating his corporate employer; "when a defendant is itself a collective entity, it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its actions." *Id.* at 302.[14]

The Eleventh Circuit recognized this conflict as applied to the particular facts of this case, stating that the decision below "puts our circuit in conflict with the Seventh Circuit's decision in *Baker v. IBP, Inc.*" Pet. App. at 10a. The *Baker* case involved allegations that are almost identical to the allegations in the instant case. The *Baker* plaintiffs alleged an enterprise consisting of "IBP plus the persons and organizations who help it find aliens to hire." 357 F.3d at 691. The *Baker* court rejected these allegations as insufficient. The conflict with the holding below could not be more plain. For the same reasons the Court granted review last Term, it should do the same now.

In addition, the Court should grant review here to consider an antecedent misinterpretation of RICO's enterprise definition that has gained wide acceptance among lower courts, but is clearly wrong: the flawed view that a corporation can be a member of an association-in-fact

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[14] The Third Circuit later overruled a different portion of *Brittingham*, which addressed application of § 1962(c) to "officers and employees acting through a corporate enterprise," *see Jaguar Cars, Inc.* v. *Royal Oak Motor Car Co.*, 46 F.3d 258, 266, 268-69 (3d Cir. 1995). *Jaguar Cars* did not alter *Brittingham*'s holding that a defendant corporation and its third-party agents could not constitute a RICO enterprise. *See id.* at 268.

enterprise.[15] RICO's definition provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). It is plain—both from ordinary meaning and structure of the statute itself—that the "group of *individuals* associated in fact" refers only to groups of natural persons, not groups of corporations. See *Webster's Third International Dictionary of the English Language* 1152 (1969) (defining "individual" as "a single human being as contrasted with a social group or institution"); 18 U.S.C. § 1961(4) (listing at outset of definition "individual" separately from other entities, including "corporation).[16] Indeed, when confronted with this issue last Term, the United States did not defend the Eleventh Circuit's holding that corporations were "individuals" within the meaning of RICO's enterprise definition. See Br. of United States as Amicus Curiae at *6, *Mohawk Indus., Inc.* v. *Williams*, 2006 WL 680358 (Mar. 16, 2006).

Instead, the focus last Term was on whether the definition of "enterprise"—in light of its introduction by the term

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[15] The reasons why this view is flawed, though summarized below, are set forth more fully in the merits briefs in this case from last Term. *See* Pet. Br. at *12-26, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016, 2006 WL 282167 (2006) (No. 05-465); Pet. Reply at *1-8, *Mohawk*, 2006 WL 951123.

[16] At oral argument in this case last Term, Chief Justice Roberts commented that "it does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Tr. Oral Arg. at 29, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). *See also id.* at 32 (Kennedy, J.) ("A person is defined – in sub (3) just above it. A person includes any individual or entity. Then the next thing [§ 1961(4)] says individual. So it's not a—it doesn't sound like a corporation."); *id.* at 51 (Souter, J.) (noting the "peculiarity of the definition" of enterprise, which lists "A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included").

"includes"—was comprehensive or instead merely provided a list of examples that could be judicially expanded upon. As this Court has recognized, "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 (1934). The structure of RICO provides powerful evidence that Congress used "includes" to introduce comprehensive definitions.[17]

A reading of § 1961(4) to mean what it says accords with the "two aims" of RICO: "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). Expanding the meaning of "group of individuals" to encompass corporations takes RICO well beyond these purposes. Such an expansion threatens to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk*, 126 S. Ct. 2016 (2006) (Breyer, J.) (No. 05-465).

The circuit courts' rationales for "RICO-izing" groups of corporations are thoroughly unpersuasive. For instance, the Eleventh Circuit has baldly held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985). See also *United States* v. *Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988). Others have grafted language onto § 1961(4) that is plainly not there. See *Bunker Ramo Corp.* v.

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[17] Justice Alito commented on this point at oral argument, asking: "Why shouldn't includes here be read to mean means when that seems to be the way it's used in other subsections of this provision and when the only thing that seems to be ... omitted from the list is what's involved here, which is a group consisting of a corporation or ... other legal entity ... and natural persons." Tr. Oral Arg. at 42, *Mohawk*, 126 S. Ct. 2016 (No. 05-465).

United Bus. Forms, Inc., 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals associated in fact with various corporations'"). Other courts have simply relied on the term "includes"—without any analysis of whether "includes" was used elsewhere in RICO to introduce comprehensive definitions. See, *e.g.*, *United States* v. *Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991); *Thevis*, 665 F.2d at 625; *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979).

Throughout this litigation, petitioner has contended that the enterprise alleged is legally deficient. Indeed, petitioner specifically asked the Eleventh Circuit to rehear this case en banc to reconsider long-established, but deeply flawed, precedents holding that an association-in-fact enterprise may consist of a group with a corporation as a constituent member. See Pet. App. at 81a-83a (requesting reconsideration of *Navarro-Ordas*, 770 F.2d at 969 n.19 and *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)).[18]

The courts of appeals may be unanimous on this point, but they are unanimously wrong and their reasoning does not withstand scrutiny. As a result, numerous civil suits—most of which result in strike suit settlements—are predicated upon a theory that lacks support in the statute. This Court should grant certiorari to correct this misinterpretation of RICO and

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[18] That Mohawk is appealing pursuant to 28 U.S.C. § 1292(b) is of no moment. The district court specifically granted Mohawk permission to file an interlocutory appeal concerning whether "Plaintiffs had adequately alleged the existence of a RICO enterprise." Pet. App. at 70a. *See also Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 205 (1996) ("the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court'" (quoting 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], at 300 (2d ed. 1995))).

restore "association-in-fact" enterprises to the scope Congress intended.

III. A CLAIM FOR SUPPRESSED WAGES IS NOT AN INJURY TO "BUSINESS OR PROPERTY" UNDER RICO.

The Eleventh Circuit's decision also raises a third important issue concerning the meaning of injury to "business or property." Under RICO, only a "person injured in his business or property by reason of a [RICO] violation" has standing to bring a civil claim. 18 U.S.C. § 1964(c). See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.").

Plaintiffs in this case claim that their allegedly depressed wages constitute an injury to "their *property* by reason of Mohawk's violations of 18 U.S.C. § 1962(c)." Pet. App. at 104a (Compl. ¶ 90) (emphasis added). The lower courts have divided four to one over whether an hourly wage injury constitutes an injury to "business or property." Below, the Eleventh Circuit joined the Second and Ninth Circuits and the Washington Supreme Court in holding that such injuries do give rise to civil RICO standing. See Pet. App. at 12a-13a (allegations of depressed wages constitute injury to business); *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (allegations of depressed wages constitute injury to property); *Diaz* v. *Gates*, 420 F.3d 897, 898 (9th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1069 (2006) (finding "lost employment, employment opportunities, and … wages" from false imprisonment an injury to property); *Jund* v. *Town of Hempstead*, 941 F.2d 1271, 1286 (2d Cir. 1991) (upholding a damages award for "lost wages" related to demotion); *Rice* v.

Janovich, 742 P.2d 1230, 1237 (Wash. 1987) ("loss of wages was an injury to his 'business'").[19]

In contrast, the Seventh Circuit has concluded that hourly wages are not sufficient to confer civil RICO standing. In *Evans* v. *City of Chicago*, plaintiff alleged that he had been "damaged in his 'business or property' by being falsely imprisoned ... because he lost potential income during that period of time." 434 F.3d 916, 925 (7th Cir. 2006). The Seventh Circuit rejected that view, holding that the plaintiff's "loss of income as a result of being unable to pursue employment opportunities" was "quintessentially [a] pecuniary loss[] derivative of personal injuries," which the court found did not fall within the interests protected by the terms "'business or property.'" *Id.* at 926-27. The Seventh Circuit expressly acknowledged that its decision created a circuit split, noting that its decision was "at odds with that of the ... Ninth Circuit" *en banc* decision in *Diaz* v. *Gates*. *Id.* at 930 n.26 (citing *Diaz*, 420 F.3d 897).

Further, this conflict over whether an injury to wages is sufficient to support RICO standing implicates underlying circuit conflicts over the meaning of the terms "property" and "business" in RICO § 1964(c). The Ninth Circuit has accepted allegations identical to those of plaintiffs in this case as alleging a sufficient injury to "property." In *Mendoza* v. *Zirkle Fruit Co.*, the Ninth Circuit also confronted RICO claims of hourly workers seeking to recover depressed wages stemming from allegations of unlawful hiring. The court held that the plaintiffs adequately "allege[d] an injury to their property in the form of lost wages." 301 F.3d at 1168. The Ninth Circuit rejected defendants' argument that the plaintiffs

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[19] The First Circuit has also suggested without holding that wage-related injuries suffice to establish civil RICO standing. *See Libertad* v. *Welch*, 53 F.3d 428, 437 n.4 (1st Cir. 1995) ("Plaintiffs ... could have standing to sue under RICO, if they were to submit sufficient evidence of injury to business or property such as lost wages ....").

were required "to show a 'property right' in the lost wages, by showing that they were promised or contracted for higher wages." *Id.* at 1168 n.4. According to the court, the "case does not implicate procedural due process," *id.*, an analysis of which typically relies on whether state law recognizes a property interest, see, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Instead, the court found—as a matter of federal law—a property right in the form of "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Mendoza*, 301 F.3d at 1168 n.4. This approach is similar to that adopted by the Eighth Circuit, which has also upheld a property interest without looking to principles of state law and rejecting the defendants' contention that "whether a particular interest amounts to property ... is quintessentially a question of state law." *Bieter Co.* v. *Blomquist*, 987 F.2d 1319, 1329 n.7 (8th Cir. 1993) (citations and internal quotation marks omitted).[20]

In contrast to the Eighth and Ninth Circuits, the First and Sixth Circuits have held that state law determines the contours of "property" under RICO. The only role for federal law, according to these circuits, is to narrow (not expand) the class of interests otherwise recognized by state law that satisfy civil RICO's "property" requirement. See *Isaak* v. *Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397-98 (6th Cir. 1999); *DeMauro* v. *DeMauro*, 115 F.3d 94, 96-97 (1st Cir.

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[20] Ultimately, the Eighth Circuit found an injury to property in the form of a loss of "what likely would have been the most valuable use of [plaintiff's] property." 987 F.2d at 1329. The court recognized that "the existence of a property interest" is typically controlled by state law in "takings or due process cases," *id.* at 1329 n.7, but held that plaintiff had "not suffered a taking" and rejected a theory that the plaintiff "would have to first ... acquir[e] a cognizable property right" under state law before bringing a civil RICO suit. *Id.* at 1329 n.9.

1997).[21] Thus, in evaluating a plaintiff's civil RICO claim that her husband fraudulently concealed marital assets during divorce proceedings, the First Circuit examined New Hampshire law to decide what property interest the plaintiff had in the marital assets. *DeMauro*, 115 F.3d at 96 (deciding how "much of the real property and monies described in the complaint [are] Annette's property"). Likewise, the Sixth Circuit scrutinized Ohio law in deciding what property interests plaintiffs possessed when they purchased an interest in timeshare resorts. *Isaak*, 169 F.3d at 397-98 (concluding that Ohio state law gave plaintiffs more than a contract interest including "the right to use, enjoy or dispose of land or chattels"). See also *DeMauro*, 115 F.3d at 97 (federal law will "decide whether a given interest, recognized by state law, rises to the level of 'business or property'" for purposes of § 1964(c)); *Patterson* v. *Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003) (stating that "federal law should determine whether a given property interest, recognized by state law, rises to the level of RICO 'business or property'").

In this case, the Eleventh Circuit quoted the Ninth Circuit's holding in *Mendoza* verbatim, but did not attempt to justify it as a federally-created "property" interest. Instead, the Eleventh Circuit held that plaintiffs' allegations of depressed wages constituted an injury to their "business" because they have "'a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.'" See Pet. App. at 13a (quoting *Mendoza*, 301 F.3d at 1168 n.4). See also *Rice*, 742 P.2d at 1236 (rejecting defendants' claim that "lost wages are not recoverable").[22]

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[21] The Fifth Circuit has also endorsed this approach. *See Patterson* v. *Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003) (relying upon, *e.g.*, *Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998)).

[22] The Second Circuit has also noted that it concurs with the holdings of the Eleventh Circuit and Washington Supreme Court, noting that "[e]ven were no property rights at play, we could not agree that loss of

This Court should grant certiorari to resolve the issues of whether a wage-related injury constitutes an injury to "business or property" under RICO. In so doing, this Court will have the opportunity to resolve underlying splits over the meaning of each of the two terms—"business" and "property"—that support RICO standing. Plaintiffs' alleged wage-suppression injuries are plainly not injuries to property under state law (and plaintiffs have cited no case suggesting otherwise). Nor are those injuries to a business as that term is used within RICO. Like the other questions presented in this petition, the Eleventh Circuit's contrary holding continues to ensure that RICO reaches beyond its admittedly broad scope and, with the promise of treble damages and attorneys' fees, intrudes upon labor and other business disputes that are already the province of other extensive areas of substantive law and regulation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
JUAN P. MORILLO
STEVEN T. COTTREAU
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

December 19, 2006

* Counsel of Record

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employment does not injure one's 'business.'" *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 24 n.2 (2d Cir. 1990).